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ALEXANDER L. STEVAS,
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

JOSEPH ANTHONY LAMAINA
and
JAMES CONOVER,

Petitioners

v.

UNITED STATES OF AMERICA,

Respondent

PETITION

For a Writ of Certiorari to the United States Court
of Appeals for the Third Circuit

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QUESTION PRESENTED

When unquestionably denied effective assistance of counsel on direct appeal, should not petitioners be permitted an appeal, nunc pro tunc by way of reconsideration as opposed to proceeding via habeas corpus pursuant to 18 U.S.C. §2255?

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NO.

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OCTOBER TERM, 1982

JOSEPH ANTHONY LAMAINA
and
JAMES CONOVER,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

PETITION
For a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit.

TO THE HONORABLE, THE CHIEF JUSTICE OF
THE UNITED STATES AND THE ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE
UNITED STATES:

Joseph Anthony LaMaina and James
Conover hereby petition that a writ of
certiorari issue to the United States
Court of Appeals for the Third Circuit.

to review its judgment at Nos. 82-5267 and 82-5268.

OPINIONS BELOW

The Court of Appeals affirmed petitioners' convictions by judgment-order entered on May 20, 1983, which is reproduced at A-1. On July 1, 1983, a petition for panel rehearing was denied without prejudice to appellants' rights to present their contentions in a 28 U.S.C. §2255 proceeding. That order appears at A-4. A stay of issuance of the mandate until August 30, 1983 was granted on July 18, 1983 and is appended hereto at A-6.

JURISDICTION

Joseph Anthony LaMaina and James Conover were convicted by a jury upon Indictment No. 81-308 in the District of New Jersey. Each was sentenced to a term of imprisonment and was admitted to bail pending appeal. The judgment-order affirming the convictions (A-1) was entered on May 20, 1983. Rehearing was denied on July 1, 1983 (A-4).

This Court's certiorari jurisdiction is established by 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

The issue presented calls upon this Court to construe and apply the Fifth and Sixth Amendments to the Constitution of the United States which provide in pertinent part:

"No person shall be...deprived of life, liberty, or property, without due process of law...."
USCS Constitution, Amendment Five.

"In all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense." USCS Constitution, Amendment Six.

STATUTORY PROVISION

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and di-

rect the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances. 28 U.S.C. §2106.

STATEMENT OF THE CASE

Joseph Anthony LaMaina and James Conover were convicted by a jury in the District of New Jersey upon an indictment charging conspiracy to obstruct justice (18 U.S.C. §371), false declarations before a grand jury (18 U.S.C. §1623), embezzlement of union funds (29 U.S.C. §501), failure to file a financial report of a labor organization (29 U.S.C. §§431(b), 437, 439(a) and (d)), and aiding and abetting (18 U.S.C. §2). During the eleven-day trial, the jury heard testimony from thirty-nine witnesses and numerous documents were received in evidence. Petitioner LaMaina was represented at trial by Philip J. LiVolsi, Esq.; Conover was represented by other counsel. Only on the sixth day of trial and following the conclusion of the direct testimony of the government's last witness

did the government bring to the trial court's attention that defense counsel, Philip J. LiVolsi, Esq., had a conflict of interest in representing Mr. LaMaina. It was then revealed for the first time that LiVolsi had represented the government's principal prosecution witness in both federal and state grand jury investigations of the incidents giving rise to this indictment as well as at least three (3) other unrelated matters. The government witness, Edward Rush, admitted to the trial court that LiVolsi had advised him concerning practically every answer which he gave in questioning before the federal grand jury; Rush left the grand jury room approximately thirty-nine (39) times to consult with counsel. Additionally, the trial judge was informed that defense attorney LiVolsi had represented both defendants, LaMaina and Conover, during the federal

grand jury investigation which resulted in this indictment for inter alia, obstructing justice and false declarations before a grand jury. Moreover, Mr. LiVolsi had previously acted as counsel to the union and had attended meetings which became the subject of disputed testimony at trial. There was conflicting testimony concerning what had occurred at certain union membership meetings. Since the jury had heard testimony evidencing Mr. LiVolsi's participation in certain matters, his cross-examination of those and other witnesses regarding damaging evidence against the defendants must necessarily have been hampered and affected by evidence of his own participation. Mr. LiVolsi ought properly have been a witness in the case rather than an advocate. His questionable and ineffective performance as trial counsel, coupled with the jury's knowledge of his

personal involvement in matters under inquiry, and combined with the jury's knowledge of his prior representation of the government's principal witness, compel the conclusion that petitioners were unfairly prejudiced in numerous ways. Their subsequent waivers of his many conflicts were ineffective, uninformed and coerced.

Following their convictions, petitioners were represented on appeal by their trial counsel. The brief filed by Mr. LiVolsi on behalf of Mr. LaMaina was joined in by Mr. Conover's attorney, and no separate brief was filed on his behalf.

Despite the existence of numerous substantial issues, Mr. LiVolsi raised four (4) points, each of which was wholly frivolous and without any merit whatsoever. Three (3) grounds contended that defense witnesses should have been

believed over government witnesses. The remaining ground alleged improper exclusion of evidence by the trial judge. Even when considering that this appeal was Mr. LiVolsi's first experience in representing a criminal defendant before the Third Circuit Court of Appeals, it is painfully apparent that petitioners were denied effective assistance of counsel on appeal.

On May 20, 1983, a judgment order was entered, without argument and without opinion, affirming the convictions of petitioners in the District of New Jersey. Present counsel was retained by petitioners and a Petition for Panel Rehearing was filed on June 17, 1983. In that Petition, present counsel urged the panel to grant reconsideration and thereby permit, in effect, an appeal nunc pro tunc. However, on July 1, 1983, that Petition was denied without pre-

judice to petitioners' rights to present their contentions in a proceeding pursuant to 28 U.S.C. §2255. Upon request, issuance of the mandate was stayed to August 30, 1983 to permit application to this Court for a Writ of Certiorari. Petitioners remain on bail pending appeal.

ARGUMENT

The right to effective assistance of counsel pertains to appeal as well as at the trial stage of criminal proceedings. United States v. DeFalco, 644 F.2d 132 (3d Cir. 1979). Appellate review of a criminal conviction is an "integral part of [our] system for finally adjudicating [one's] guilt or innocence." Griffin v. Illinois, 351 U.S. 12, 18, 76 S.Ct. 585, 590, 100 L.Ed. 891 (1956). Moreover, 28 U.S.C. §2106 gives this Court, as well as all courts of appellate jurisdiction, the power to make such disposition of a matter as may be just under the circumstances. Thus, since petitioners have been denied any meaningful appellate review of their convictions, the interests of justice and judicial economy require that they be permitted appellate review, nunc

pro tunc, by way of panel rehearing in the Court of Appeals for the Third Circuit.

The ineffective assistance of counsel which is so evident upon review of the brief filed on behalf of appellants also permeated the trial. Mr. LiVolsi never requested nor received a bill of particulars. Consequently, the government was allowed to proceed at trial upon several, alternate theories of embezzlement. Only after irrelevant and highly prejudicial evidence was presented to the jury in support of these alternative theories of guilt was the government finally required to elect which theory it relied upon. Thus, even though only one theory was submitted to the jury for deliberation, most of the government's evidence concerned other alleged crimes by the defendants. Such evidence could not have been erased from the jury's

consideration. This issue was not raised on appeal by prior counsel.

Similarly, the trial court erroneously instructed the jury as to the elements of embezzlement under 29 U.S.C. §501. The charge was vague, ambiguous and confusing as to the elements of "knowingly" and "intentionally" and excluded good faith or lack of intent as a defense. These errors were not raised on appeal by prior counsel.

Of course, the most fundamental error at trial, the conflict of interest on the part of Mr. LiVolsi, was similarly not addressed on appeal.

A remedy exists for redress of these fundamental errors. A petition can be filed in 18 U.S.C. §2255 raising the ineffectiveness of counsel on appeal and seeking a new appeal wherein to raise the trial errors and perhaps gain a new trial. However, this procedure would

be the most judicially cumbersome, burdensome and time consuming of any conceivable means of addressing these issues. A \$2255 proceeding would be initiated with the trial judge, who has previously ruled upon each of the trial issues as they arose. Moreover, an appellate court can best determine the effectiveness of counsel on appeal. It seems unnecessarily redundant to require petitioners to go back before the trial judge and relitigate matters already ruled upon in that forum and claim ineffective assistance of counsel on appeal; since the trial judge is unlikely to reverse himself, an appeal will most probably result and the case will again find itself before the Third Circuit Court of Appeals. Meanwhile, petitioners may be incarcerated during this tedious process even though they have been denied representation by competent coun-

sel and meaningful appellate review of their convictions.

It is indeed unusual that a change in counsel comes at such a time in the appellate process so as to raise the issue of ineffective assistance of counsel on appeal during the pendency of the appeal. Yet the novelty of the procedural posture of this case should not preclude the granting of the relief sought. This Court, as did the Court of Appeals, clearly has the power, under 28 U.S.C §2106, to order rehearing and permit rebriefing of this appeal by present counsel. Although perhaps unorthodox, this procedure would be the most efficient in terms of the court's time, and most fair to petitioners.

CONCLUSION

For the foregoing reasons, this Court is urged to grant a writ of certiorari to the Court of Appeals for the Third Circuit and to remand for appeal, nunc pro tunc, by way of panel rehearing.

Respectfully submitted,


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Attorney for Petitioners

Dated: August 26, 1983

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 82-5267 and 82-5268

UNITED STATES OF AMERICA

v.

JOSEPH ANTHONY LAMAINA and
JAMES CONOVER

Joseph Anthony LaMaina,
Appellant in No. 82-5267

(D.C. Crim. No. 81-00308-01)

UNITED STATES OF AMERICA

v.

JAMES CONOVER,
Appellant in No. 82-5268

(D.C. Crim. No. 81-00308-02)

Appeal from the United States District Court
for the District of New Jersey
District Judge: Honorable Stanley S. Brotman

Submitted Under Third Circuit Rule 12(6)

March 4, 1982

Before: ALDISERT, WEIS, and
BECKER, Circuit Judges.

JUDGMENT ORDER

After considering the contentions raised by appellants, to-wit, that:

(1) the trial court erred in denying the defendants' motion for judgment of acquittal and in the alternative for a new trial in light of the fact that the evidence was insufficient to sustain a conviction as to the offenses of conspiracy to corruptly influence, obstruct and impede the due administration of justice, and perjury before a grand jury in the form of false documentary evidence and/or oral testimony; (2) the trial court erred in denying the defendants' motion for judgment of acquittal and in the alternative a new trial in light of the fact that the evidence was insufficient to sustain a conviction as to both defendants as to the offense of embezzlement; (3) the court erred in denying defendants' motion for judgment of acquittal and in the al-

ternative for a new trial in light of the fact that the evidence was insufficient to sustain a conviction as to willful failure to file a labor organization annual report; and (4) the court erred in preventing defense counsel's introduction of a witness to establish that the government's witness falsely stated a specific act; it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

|s| Weis
Circuit Judge

Attest:

|s| M. Elizabeth Ferguson
Chief Deputy Clerk

DATED: May 20, 1983

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 82-5267/68

UNITED STATES OF AMERICA

v.

JOSEPH ANTHONY LaMAINA and
JAMES CONOVER

Appellants

SUR PETITION FOR PANEL REHEARING

Before: ALDISERT, WEIS and

BECKER, Circuit Judges.

The petition for panel rehearing filed by appellants in the above case having been submitted to the judges who participated in the decision of the court, and, after consideration of said petition it is

ORDERED that the petition for panel rehearing is denied without prejudice to

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appellants' rights to present their contentions in a 28 U.S.C. §2255 proceeding.

BY THE COURT,

|s| Weis
Circuit Judge

DATED: July 1, 1983

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 82-5267 & 82-5268

UNITED STATES OF AMERICA

v.

JOSEPH ANTHONY LAMAINA and
JAMES CONOVER, Appellants

Pursuant to Rule 41(b) of the Federal
Rules of Appellate Procedure, it is
O R D E R E D that issuance of the certi-
fied judgment in lieu of formal mandate in
the above cause be, and it is hereby stayed
until August 30, 1983.

|s| Weis
Circuit Judge

Dated: July 18, 1983